

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

## HENRY CABRERA-YANES

Claimant

VS.

**NATIONAL BEEF PACKING CO., L.P.**

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 1,004,328

## ORDER

Claimant requests review of the February 13, 2004 Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Appeals Board (Board) heard oral argument on July 13, 2004.

## APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Terry J. Malone of Dodge City, Kansas, appeared for respondent and Liberty Mutual Insurance Company.

## RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award. During oral argument to the Board, the parties agreed that all of the exhibits offered at and attached to the depositions are part of the record and should be considered by the Board. In addition, although the ALJ listed “notice” as an issue and determined that issue in claimant’s favor in the Award, the Board notes that respondent stipulated to timely notice of accident in its February 10, 2004 Submission Letter.

**ISSUES**

After finding that “[c]laimant has failed to meet his burden in proving that his injury arose out of and in the course of his employment on April 28, 2002,”<sup>1</sup> Judge Fuller denied claimant’s request for benefits.

Claimant argues that he did meet his burden of proof in showing he did suffer injury while at work and believes he is entitled to a ten percent functional impairment to the right forearm, plus payment of his past and future medical treatment expenses.

Respondent argues that due to the lack of consistency between claimant’s testimony and the testimony of multiple co-workers, claimant failed to prove his injury arose out of and in the course of his employment. Accordingly, respondent contends the ALJ’s Award should be affirmed and that claimant’s request for benefits should be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties’ briefs and arguments, the Board finds and concludes that the ALJ’s Award should be affirmed.

Claimant testified that on April 28, 2002, while working for the respondent in the maintenance department, he injured his hand when a wrench he was using slipped on the part being turned, and his hand hit the floor. According to the claimant, the accident happened late in the day, about 5:00 p.m. Claimant worked that day from 7:00 a.m. until 7:00 or 7:30 p.m. Claimant did not report an accident on the date he alleged it occurred, Sunday, April 28, 2002. Instead, he first reported the accident to his foreman the following day, Monday, April 29, 2002. Claimant worked all day Monday, Tuesday and Wednesday of that week.

Claimant did not ask respondent for medical treatment but instead went on his own to the hospital emergency room on Thursday, May 2, and was seen by Dr. Alok Shah. Although claimant reported the accident as work-related at the hospital emergency room, the description of the accident is somewhat different from the description he later testified to. The medical records of Dr. Shah reflect “[t]he patient gives a history that [he] was at National Beef in the maintenance, and had dropped a heavy metal object on his right hand on Sunday.”<sup>2</sup>

Claimant's testimony is contradicted, in particular by a co-worker, Walter Ince. Mr. Ince testified that claimant was complaining about his hand before noon that day.

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<sup>1</sup> Award at 4 (Feb. 13, 2004).

<sup>2</sup> Cabrera Depo. at 27.

Q. (Mr. Malone) What do you remember about that day, April 28, 2002?

A. (Mr. Ince) We changed shear bolts in what is now the main collect auger, and we changed those out. It's a monthly PM, and it's a process of using a torch to cut the bolts out and taking a hammer and slamming them down, and you take the pipe wrench to turn the shaft on - - the screw on the auger to get them out.

Q. Okay. Was Henry doing that type of work that day?

A. He was helping me do the type of work. He had trouble running the torch, so I ran the torch to cut the bolts.

Q. Okay. Let me ask you, did he tell you why he was having trouble running the torch?

A. No, he just - - he said his hand was hurting, but he didn't tell me why or what reason.

Q. Okay now, your shift was from 7:00 a.m. to 7:00 p.m., correct.

A. Yes.

Q. All right. When did you first learn about his hand hurting on that day of April 28<sup>th</sup>?

A. It would have been when we started the project, which after we got all the stuff rounded up, it probably would be between afternoon and in the morning, somewhere around there, not exact time.<sup>3</sup>

. . . .

Q. (Mr. Malone) Wally, I have just one other follow-up question. Although you answered to Mr. Ausemus that you didn't know exactly when he hurt his hand or how he hurt his hand or where he hurt his hand, you do remember that he had complained about his hand hurting before noon; is that right?

A. (Mr. Ince) Yes.

Q. All right. And the reason you remember that is because he needed assistance with the acetylene torch?

A. Yes.<sup>4</sup>

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<sup>3</sup> Ince Depo. at 4 and 5.

<sup>4</sup> Ince Depo. at 11.

Claimant correctly points out that Mr. Ince's deposition was taken many months after the event and that he was initially quite vague about what time of day claimant first voiced complaints about his hand. However, Mr. Ince later clarified that he was certain it was before noon. This fact is supported by the accident investigation report prepared shortly after the incident by Jeff Brodecky, respondent's safety and health director.

After interviewing Henry, I called in Wally Ince. I asked Wally if he knew anything about the injury to Henry. He stated no. I asked him if he worked with Henry on Sunday, he said yes from 7:00 a.m. to 7:30 p.m. He told me that he worked with Henry all day and their job was to change the shear bolts in the augers. He said that they worked within a couple of feet of each other all day and if the wrench would have fell he would have known it. He told me that Henry complained of his hand hurting all day long. I asked him when was the first time he noticed Henry's hand hurting and he said the first job that they started on he asked Henry to cut the bolt off with a cutting torch and that Henry couldn't do it because he couldn't squeeze the torch head because his hand was hurt, this was about 7:30 - 8:00 a.m.<sup>5</sup>

Although each and every discrepancy by itself may not appear significant, when taken together with the other inconsistencies and contradictions in the record, the Board is persuaded that claimant failed to meet his burden of proving his injury arose out of and in the course of his employment. Therefore, due to the inconsistencies in the record and evidence contradicting claimant's version of events, the Board finds that the ALJ's Award should be affirmed.

**WHEREFORE**, the Award of Pamela J. Fuller, dated February 13, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2004.

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BOARD MEMBER

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<sup>5</sup> Brodecky Depo. Ex. 1.

c: Stanley R. Ausemus, Attorney for Claimant  
Terry J. Malone, Attorney for Respondent and Liberty Mutual Insurance Co.  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director